



State of Rhode Island and Providence Plantations
DEPARTMENT OF EDUCATION
Shepard Building
255 Westminster Street
Providence, Rhode Island 02903-3400

Peter McWalters
Commissioner

To: Superintendents, Directors of Special Education and other School Officials
From: Peter McWalters *Peter McWalters*
Re: Commissioner's Advisory Regarding Students with Disabilities Parentally Placed in Private Schools
Date: December 6, 2005

INTRODUCTION:

In Rhode Island Department of Education (RIDE) guidance regarding the implementation of changes to the federal special education law (IDEA-2004) school districts have been notified that there are key changes to the federally imposed school district responsibilities regarding students with disabilities who are parentally placed in private school. This summer, when guidance was initially issued on these federal changes (most notably the change in the federal law that creates responsibilities for providing services for the district where the child is enrolled in private school rather than the prior requirement that the child's district of residence provide all evaluations and services) it was not possible for RIDE to fully assess the impact of this federal change on Rhode Island school districts nor to fully analyze the implications of differences between these new federal requirements and the existing state regulations.

At that time the United States Department of Education was emphatic in its commitment to issue final federal regulations interpreting the new requirements in IDEA-2004 by this week. The guidance issued by RIDE was based at least in part on that commitment and the belief that the Rhode Island Board of Regents special education regulations would be reviewed and revised by the Board of Regents during the 2005-2006 school year.

It is now clear that the final federal regulations will not be available to further guide our understanding of these issues for some time. This means that the existing state regulations may not be reviewed and revised by the Board of Regents through the public hearing process until the 2006-2007 school year. In addition, new information continues to become available from other states and federal authorities concerning the implementation of the changes in special education law.

Telephone (401)222-4600 **Fax** (401)222-6178 **TTY** 800-745-5555 **Voice** 800-745-6575
Website: www.ridoe.net

The Board of Regents does not discriminate on the basis of age, color, sex, sexual orientation, race, religion, national origin, or disability

In the months since the start of the 2005-2006 school year RIDE has received many requests for clarifications and explanations concerning this dramatic shift of district responsibilities and student rights for students with disabilities whose parents have enrolled them in private school. After additional research and analysis and careful comparison with the approach being taken in other states where state regulations are different from the provisions of the new federal law, it is now clear that until such time as the Board of Regents reviews the existing state regulations Rhode Island school districts must implement all aspects of BOTH the new federal requirements and the differing requirements in the existing state regulations.

DIFFERING STATE AND FEDERAL REQUIREMENTS TO PROVIDE SPECIAL EDUCATION SERVICES TO PARENTALLY PLACED PRIVATE SCHOOL STUDENTS:

The Rhode Island Board of Regents' existing state regulations governing the education of children with disabilities require school districts to offer special education and related services to all students who reside in the district, including private school students. These services must be designed to meet the needs of eligible students and must provide students with a genuine opportunity to participate in a public school special education program. The school district must provide or arrange for evaluation, determine eligibility, propose an Individualized Education Program (IEP), and make services that constitute a "Free Appropriate Public Education" (FAPE) available to all eligible students who reside in the district, regardless of where they attend school. These regulations were last revised by the Board of Regents through the public hearing process after the passage of IDEA-1997 and remain in full force and effect today.

In contrast to the IEP and FAPE requirements of the Rhode Island regulations, federal special education law (IDEA-1997 and IDEA-2004) also require school districts to provide special education services to private school students; however since 1997 the federal law does not require the development of an IEP nor does it include the individual entitlement to FAPE that remains in the existing Rhode Island regulations.

Similar to existing Rhode Island regulations, under IDEA-1997 school districts were required to conduct child find activities and conduct evaluations to determine students' eligibility for special education. However, in 1997 the federal law was amended to require school districts to expend only a proportionate share of federal money received under Part B of IDEA to provide special education services to students with disabilities enrolled by their parents in private schools. "Proportionate share" under federal law means the district must spend an amount that represents the same proportion of its federal grant on services for private school students as private school students represent within the population of students with disabilities served by the district as a whole.

Under the federal law, school districts determine which services to provide with that proportionate share of funds following consultation with involved private

schools. Districts provide proportionate-share services to eligible students through an "individual services plan"(Services Plan) instead of an IEP, and private school students do not have an individual entitlement to special education services as they do under Rhode Island's existing state regulations. Federal due process protections, including the entitlement to individual services and the right to a hearing, do not extend to private school students under the federal provisions, but they are retained in the existing Rhode Island state regulations.

After the change in federal law in IDEA-1997 (no individual entitlement to an IEP and FAPE, provision of a Services Plan with services provided only to the "proportionate share" level of funding) the existing Rhode Island regulations were reviewed, but in the revision process the rights of private school students with disabilities to an IEP, FAPE, and due process were retained, largely predicated upon testimony before the Regents during public hearings that students with disabilities are the responsibility of the community in which they reside regardless of where they attend school. This did not create a substantial difficulty in the implementation of the differing requirements in federal and state special education law and regulation because by meeting the higher state standards districts were automatically in compliance with the lesser federal requirements.

However, a significant change to federal law under IDEA-2004 changes the responsibility for providing the lesser federally guaranteed special education services to eligible private school students who attend school in a district other than the one in which they live. Since the enactment of IDEA-2004 federal law now requires that the district ***where the private school is located*** - rather than the district of the student's residence - fulfill the requirements for child find (including evaluation) and for provision of federal proportionate share services.

This significant change, announced by the federal authorities shortly before the start of the 2005-2006 school year, was the basis for the earlier guidance you received instructing you that commencing with the 2005-2006 school year this change would be effective in Rhode Island. What was unclear to us at that time and what the earlier guidance did not address was how any additional individual rights retained by students with disabilities under the existing state regulations could be reconciled with this new federal change in the locus of responsibility for delivering the federally required child find activities and provision of services, in consultation with private schools, up to the proportionate share funding level.

In the intervening months we have continued to monitor the problems that have arisen around the state with the implementation of this new federal structure and to reassess the implications of the differing existing requirements in state regulation and federal law. Thus, we are now instructing all Rhode Island school districts to take action to comply with both the new federal requirements AND the additional requirements of the existing Rhode Island regulations, which are in full force and effect until such time as they are reviewed and revised by the Board of Regents through the public hearing process.

NEW OBLIGATIONS FOR DISTRICT TO STUDENTS ENROLLED IN PRIVATE SCHOOLS IN THE DISTRICT:

Pursuant to IDEA-2004 districts *are* in a new relationship with the private schools located in their district and private school students with disabilities attending school in their district. As previously instructed, effective July 1, 2005, districts must fulfill the Child Find and consultation requirements of the Act and establish Services Plans for students with disabilities who attend a private school in the district. The Child Find obligation includes an evaluation obligation. Districts must also provide services to students with disabilities who attend a private school in the district pursuant to the Service Plan and capped at the proportionate share of federal funds as previously advised by RIDE. This would be the entire obligation of districts to parentally enrolled private school students with disabilities were it not for the continuing validity of the existing state regulations – to the extent that these regulations contain entitlements for students additional to the new federal Service Plan requirement.

CONTINUING OBLIGATIONS FOR DISTRICTS TO STUDENTS WHO ARE RESIDENTS OF THE DISTRICT UNDER EXISTING STATE REGULATIONS:

Because the state regulations have not yet been reviewed and revised by the Board of Regents in light of the federal changes discussed above, we are now instructing districts that they retain a separate and additional obligation under the state regulations. To the extent that a student who ***resides*** in your district has identified special needs (that is the student has had an IEP prior to July 1, 2005 or has been referred for evaluation and this results in eligibility and an IEP), that student must be provided with an IEP and FAPE if the services that are contained in his/her IEP are in excess of or different from those services that the student is receiving under his/her Services Plan from the district in which his/her private school is located.

It is important to note that there are concurrent obligations for evaluation in both the district of private school enrollment (under their Child Find obligations) and in the district of residence (under the state law obligations to provide FAPE). The district of private school enrollment and the district of residence are encouraged to work together cooperatively to coordinate their evaluation and service provision efforts. This is essential in order to avoid redundancy and cost inefficiency (particularly in evaluation) and to create as seamless an experience as possible for students and their families. Families of parentally placed private school students with disabilities may be interacting with two school districts (unless they live and attend school in the same district) and the students will potentially have both a Services Plan and an IEP. A summary of these situations includes:

- *Student lives and attends private school in the same community:*

If a student both attends private school and resides in the same community, then the fulfillment of the more extensive requirements for the provision of an IEP and FAPE under the state regulations will automatically fulfill the lesser federal requirement.

➤ *Student attends private school outside his/her district of residence:*

If a student attends a private school outside his/her district of residence then the district in which the private school is located must fulfill the Services Plan/proportionate share requirements pursuant to IDEA-2004 and the district of residence must coordinate with the district of enrollment to continue to provide an IEP and FAPE to the extent that doing so will require that the district of residence to go beyond the services provided by the district of enrollment under the Services Plan.

For your reference, the relevant statutory and regulatory provisions are summarized in the table below and the full text of the relevant section of IDEA-2004 is reproduced below the table.

If you have questions or concerns about the information contained in this advisory, please contact Jennifer Wood, Chief Legal Counsel, at (401) 222-8486. Thank you for your patience and flexibility as we all work through the many complex issues involved in implementing the changes to the federal special education law.

APPENDIX
STATUTORY AND REGULATORY REFERENCES

Activity	District Responsible	Statutory or regulatory citation
Child find and related evaluation for students with disabilities attending private schools in the district and consultation with private schools in the district	District where private school is located	20 U.S.C. 1412(a)(10)(A)(ii) <i>In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.</i>
Development and delivery of a Services Plan in consultation with private schools up to federal proportionate share funding level for student parentally enrolled in private school	District where private school is located	20 U.S.C. 1412(a)(10)(A)(i) Children in private schools. (A) Children enrolled in private schools by their parents. (i) In general. To the extent consistent with the number and location of children with disabilities in the State <i>who are enrolled by their parents in private elementary schools and secondary schools in the school district</i> served by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under this part [20 USCS §§ 1411 et seq.] by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f): (I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.
Development of IEP and provision of FAPE services, additional to those already provided in the child's federally mandated proportionate share funded Services Plan	District of student's residence	34 C.F.R. 300.453(d) (implementing IDEA-1997) State and local educational agencies are not prohibited from providing services to private school children with disabilities in excess of those required by this part, [referring to federally required Services Plan] consistent with State law or local policy. R.I. Regulations 300.452(b) Each LEA shall ensure that an IEP is developed and implemented for each eligible child with a disability...and that the child is afforded all of the rights of a child with a disability served by the LEA.

TEXT OF 20 U.S.C. 1412(10)(A)(i)
(IDEA-2004)

(10) Children in private schools.

(A) Children enrolled in private schools by their parents.

(i) In general. To the extent consistent with the number and location of **children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by a local educational agency**, provision is made for the participation of those children in the program assisted or carried out under this part [20 USCS §§ 1411 et seq.] by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of Federal funds made available under this part [20 USCS §§ 1411 et seq.].

(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find process to determine the number of **parentally placed children with disabilities attending private schools located in the local educational agency**.

(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.

(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.

(V) Each local educational agency shall maintain in its records and provide to the State educational agency the number of children evaluated under this subparagraph, the number of children determined to be children with disabilities under this paragraph, and the number of children served under this paragraph.

(ii) Child find requirement.

(I) In general. The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.

(II) Equitable participation. The child find process shall be designed to ensure the equitable participation of parentally placed private school children with disabilities and an accurate count of such children.

(III) Activities. In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.

(IV) Cost. The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).

(V) Completion period. Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.

(iii) Consultation. To ensure timely and meaningful consultation, a local educational agency, or where appropriate, a State educational agency, shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding--

(I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;

(II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;

(III) the consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully participate in special education and related services;

(IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of

services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and

(V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.

(iv) Written affirmation. When timely and meaningful consultation as required by clause (iii) has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the State educational agency.

(v) Compliance.

(I) In general. A private school official shall have the right to submit a complaint to the State educational agency that the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official.

(II) Procedure. If the private school official wishes to submit a complaint, the official shall provide the basis of the noncompliance with this subparagraph by the local educational agency to the State educational agency, and the local educational agency shall forward the appropriate documentation to the State educational agency. If the private school official is dissatisfied with the decision of the State educational agency, such official may submit a complaint to the Secretary by providing the basis of the noncompliance with this subparagraph by the local educational agency to the Secretary, and the State educational agency shall forward the appropriate documentation to the Secretary.

(vi) Provision of equitable services.

(I) Directly or through contracts. The provision of services pursuant to this subparagraph shall be provided--

(aa) by employees of a public agency; or

(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.

(II) Secular, neutral, nonideological. Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

(vii) Public control of funds. The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the uses and purposes provided in this title [20 USCS §§ 1400 et seq.], and a public agency shall administer the funds and property